

**NO. 42233-6-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JERRY ALLEN ANDERSON,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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Prosecuting Attorney  
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Deputy Prosecuting Attorney  
Representing Respondent**

**HALL OF JUSTICE  
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## **I. INTRODUCTION**

The appellant was charged by information in two causes, which were subsequently joined for trial. In cause number 09-1-00599-8 the appellant was charged with assault in the second degree for an incident from March 25, 2009, and assault in the second degree and violation of a no contact order for another incident from May 26, 2009. In cause number 09-1-01258-7 the appellant was charged with assault in the second degree, theft in the second degree, and obstructing for an incident from November 7, 2009. These charges were alleged to involve domestic violence.

The appellant proceeded to a jury trial in May of 2011. The appellant was found not guilty of the March incident, guilty of assault in the fourth degree and violation of a no contact order for the May incident, and guilty only of obstructing for the November incident. The appellant was sentenced within the standard range, and the instant appeal timely followed.

On appeal, the appellant argues the trial court improperly admitted prior written statements made by the victim and two other witness regarding the May incident as substantive evidence, and that the trial court erred by included a prior conviction in his criminal history. However, the trial court did not err, and the Court should affirm the convictions.

## **II. STATEMENT OF THE CASE**

The State agrees, for the most part, with the factual and procedural history as set forth by the appellant. Where appropriate, the State's brief will point to specific facts in the record regarding the issues before the Court.

## **III. ISSUES PRESENTED**

1. Did the trial court abuse its discretion by admitting prior inconsistent statements by the witnesses under ER 801(d)(1)?
2. Did the trial court improperly include the appellant's juvenile conviction for theft 2<sup>nd</sup> in his criminal history?

## **IV. SHORT ANSWERS**

1. No.
2. No.

## **V. ARGUMENT**

### **I. The Trial Court Did Not Abuse Its Discretion by Admitting the Prior Written Statements of Witnesses Under ER 801(d)(1).**

At trial, the court admitted into evidence two written statements made by Lisa Garner, aka: Lisa Shippy, and two statements written by Crystal Alvarado and Eric Smith. Exhibits 13, 14, 15, and 16. The appellant argues these statements failed to satisfy the criteria set forth in State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982) for admission as

substantive evidence under ER 801(d)(1). However, the statements were properly admitted, and the appellant's convictions should stand.

On appeal, this Court reviews the admission or exclusion of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Under this standard of review, the Supreme Court has noted that it is not the duty of the appellate court to "supplant the trial court's discretion with [its] own." State v. Cheatham, 150 Wn.2d 626, 656, 81 P.3d 830 (2003).

Here, the trial court admitted into evidence written statements made by the witnesses. Under ER 801(d)(1) and Smith, 97 Wn.2d 856, a prior sworn statement is admissible as substantive evidence if the witness testifies inconsistently with the statement and: (1) the statement was made voluntarily; (2) there were minimal guarantees of truthfulness; (3) the statement was taken as part of the process to determine the existence of probable cause; (4) the witness is subject to cross examination. The appellant concedes that the first factor, voluntariness, and the final factor, cross examination, were met. Appellant's brief at 11-12. However, the

appellant argues there were not minimal guarantees of truthfulness and that the statement of Eric Smith was not used establish probable cause.

Regarding minimal guarantees of truthfulness, Lisa Garner, aka: Lisa Shippy, testified she was unaware that each of the two written statements she made for the police regarding the May 26<sup>th</sup> incident were made under the penalty of perjury. RP 64-70. However, in both of these statements, Ms. Garner wrote her name in the following blank:

I \_\_\_\_\_ have read the above statement and I certify it to be true and correct under the penalty of perjury under the laws of the state of Washington.

Despite having written her name in the blank, Lisa Garner, aka: Lisa Shippy, claimed that she did not read the “penalty of perjury” language. RP 66-67, 69. On both of the statements, Lisa Garner, aka: Lisa Shippy, then signed her name in the signature block further down the form. Similarly, Mr. Smith claimed that, though he wrote his name in the blank, he was unaware the statement was being made under penalty of perjury. RP 866. Ms. Alvarado also admitted to having written her name in the blank, but was unable to remember if she had read the penalty of perjury language. Ms. Alvarado admitted that it would “seem kind of odd” for her to have placed her name in the blank without having read the perjury warning. RP 891-892. These exhibits are attached in Appendix 1 so as to allow this Court to consider the plausibility of these claims.



Under ER 104, the trial court is entrusted with finding whether sufficient facts have been proven on preliminary questions addressing the admission of evidence. Here, the trial court was faced with a question of credibility, whether or not to believe the witnesses' claim they were unaware of the fact they were making sworn statements to the police. The trial court ultimately found these denials unconvincing, RP 184-197, which is unsurprising given the less than credible explanations for how the witnesses came to write their names in the perjury blank without reading the language immediately after it. On questions of credibility, an appellate court will defer to the determination of the finder of fact, in this case the trial court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, the trial court found the denial of knowledge unconvincing, and the nature of the statements, including the placement of the perjury warning, supports this conclusion. The trial court carefully weighed the issue, RP 184-197, and based its conclusion on the implausibility of the witnesses' denials and the dynamics of the situation. Given this, the trial court's decision to find the statements were sworn cannot be said to be so "manifestly unreasonable" as to rise to an abuse of discretion warranting reversal. See Stenson, 132 Wn.2d at 701.

Finally, the appellant argues that the statement of Mr. Smith, exhibit 16, was not used to determine probable cause as required by Smith.

However, the investigating officer, Charlie Meadows, testified that he sent Mr. Smith's statement to the Prosecuting Attorney and used this information to compile his statement of probable cause. This was found sufficient in State v. Thach, 126 Wn.App. 297, 309, 106 P.3d 782 (2005), and the trial court did not abuse its discretion by admitting the statement, particularly when there was no specific objection on this ground. See State v. Jamison, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) ("an issue, theory, or argument not presented at trial will not be considered on appeal."), quoting Herberg v. Swartz, 89 Wn.2d 916, 578 P.2d 17 (1978).

**II. The Trial Court Correctly Included the Appellant's Theft in the Second Degree Conviction in His Criminal History.**

At sentencing, the trial court found the appellant's offender score to be eight, based upon a combination of juvenile and adult offenses. The trial court included a 1997 conviction for theft in the second degree in the appellant's criminal history, and included this conviction in the offender score. The appellant argues this was error, but the applicable statutes indicate otherwise.

In the judgment and sentence, section 2.2, the trial court listed the appellant's criminal history. CP 32. The appellant agreed with the State's recitation of his criminal history and offender score at sentencing. RP 1311, 1315. Thus, the appellant has waived this issue for appeal. State v.

Jackson, 150 Wn.App. 877, 209 P.3d 553 (2009); State v. Hickman, 116 Wn.App. 902, 68 P.3d 1156 (2003).

Should the Court consider this argument, the relevant statutes required the sentencing court to list the conviction in section 2.2, regardless of whether the conviction was included in the offender score calculation. RCW 9.94A.500(1) states that “the court shall specify the convictions it has found to exist. All of this information shall be part of the record.” Additionally, RCW 9.94A.030(11) states that:

(11) “Criminal history” means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.

(a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, RCW 9.94A.640, RCW 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

(c) The determination of a defendant's criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

Section 2.2 of the judgment and sentence, CP 32, refers to the appellant's criminal history as defined in RCW 9.94A.030(11). Thus, the

sentencing court properly included the theft in the second degree conviction in this section. Moreover, the appellant has not identified any prejudice following from the inclusion of this offense in his criminal history. As such, the Court should decline to consider this issue, or find the trial court did not err.

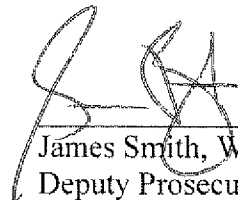
## VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the appellant's appeal and uphold his convictions. The trial court did not err, and the appellant's convictions should stand.

Respectfully submitted this 3<sup>d</sup> day of April, 2012.

Susan I. Baur  
Prosecuting Attorney  
Cowlitz County, Washington

By:

  
James Smith, WSBA #35537  
Deputy Prosecuting Attorney

for:  
JAMES.  
Smith

## APPENDIX 1

## Exhibit 13

**STATEMENT**  
**Longview Police Department**  
**360-442-5800**

(PLEASE PRINT CLEARLY)

Full Name: Shippy Lisa Lynn Birthdate: 9-6-61  
Last Name First Name Middle Name month / date / year

Home Address: 311 Baltimore St. Longview Home Phone: 703-3761  
No. and Street City

Work Address: \_\_\_\_\_ Work Phone: \_\_\_\_\_  
No. and Street City

The following statement is given to the Longview Police Department to aid an investigation. All facts given are true to the best of my knowledge.

I Live @ 311 Baltimore St. and I said it was okay for my ~~nephew~~ nephew Alex Bradburzy, Tim McHafy, Patty OBrien, my sister Crystal Alvarado, her boyfriend Eric to come over cause my nephew Alex was in town and T. hadn't seen him for awhile so he wanted to come visit and also spend the night. my friends Cory and Dereck & Derecks girlfriend ask me if they could stay the night and give me \$3000 to stay cause they were having problems @ home. I said okay. we were all out front and the neighbor lady yelled "fucking neighbors" and Jerry thought they said "Fucking niggers" he got upset and somehow we started arguing about it and the neighbors across the street got brought up (He knows them, I don't) ~~I'm not sure how but~~ He started saying that they were more his family than me →

I Lisa Shippy have read the above statement and I certify and declare it to be true and correct under the penalty of perjury under the laws of the state of Washington.

ed on 5-26-09 Time 12:35 pm

Place given 352 20th Ave.

Signature Lisa Shippy

Witness: C. Alvarado

## STATEMENT (Continued)

cause he has known them longer than the 2 yrs we have been together. we ended up fighting upstairs in the bedroom and he body slammed me a couple of times on the floor and was checking me so I couldn't scream but before I was screaming for help and nobody wanted to get involved. When we'd be downstairs he'd tell everyone that I was doing this to myself and he didn't touch me at all. I tried to get him to leave but he wouldn't. I told him I was gonna either call the cops or show up when he had court but he didn't care. I went to bed and he was outside in the back with everyone smoking and this morning when I got up he was still there and when I tried to call the cops he pulled the phone cords out and eventually left. I went to the hospital but my back was hurting too bad to keep sitting there so I was not seen. My daughter picked me up and brought me to her house. And she called the cops.

I Lisa Shippy have read the above statement and I certify and declare it to be true and correct under penalty of perjury under the laws of the state of Washington.

Executed/dated on 12:35 pm

Place given/executed 352 20th ave

Signature Lisa Shippy

Witness Maria Ziel



## Exhibit 14

**STATEMENT**  
**Longview Police Department**  
**360-442-5800**

(PLEASE PRINT CLEARLY)

Full Name: Shippy Lisa Lynn Birthdate: 9-6-61  
Last Name First Name Middle Name month / date / year

Home Address: 311 Baltimore St Longview Home Phone: 360 703-3761  
No. and Street City

Work Address: \_\_\_\_\_ Work Phone: \_\_\_\_\_  
No. and Street City

The following statement is given to the Longview Police Department to aid an investigation. All facts given are true to the best of my knowledge.

Jeery had followed me up the stairs to our bedroom & we were arguing. He punched me in the stomach so hard that I wet my pants and I ended up wetting them a total of 3 times and had to change 3 times. I have also found more bruising in the back left side of my head and the front right part of my head w/ scratches and swelling. I have <sup>scratches</sup> bruising under my left arm and bruising on the backside of my left arm and on my left breast. I have bruises on the inside of my right leg.

[REDACTED]

[REDACTED]

[REDACTED]

I, Lisa Shippy have read the above statement and I certify and declare it to be true and correct under the penalty of perjury under the laws of the state of Washington.

ted on 5-26-09 Time 6:30 pm

Place given 311 Baltimore St Longview

Signature Lisa Shippy

Witness [Signature]

## Exhibit 15

## STATEMENT

Longview Police Department

(PLEASE PRINT CLEARLY)

360-442-5800

Full Name: Alvarado, Crystal Ann Birthdate: 02-17-81  
 Last Name First Name Middle Name month / date / year

Home Address: 1165 morse park way LV. Home Phone: 577-5934  
 No. and Street City

Work Address: unemployed at time Work Phone: 0  
 No. and Street City

The following statement is given to the Longview Police Department to aid an investigation. All facts given are true to the best of my knowledge.

There was drinking involved, The argument started with my sister Lisa Shippy and her boyfriend Jerry Anderson who was there hanging out he had said something to her <sup>(Lisa Shippy)</sup> about the neighbors (friends) being more important to <sup>(Jerry Anderson)</sup> him than her and her <sup>(Lisa)</sup> family and she got all upset about it she <sup>(Lisa)</sup> walked off out into the garage then Jerry had followed and the argument continued I Crystal alvarado Lisa's sister had left the garage went upstairs to check my laundry and then I Crystal went back downstairs walked out to the garage and Jerry Anderson was on top of Lisa Shippy on the garage floor w/ hands on throat and face her head went off the mattress that they were on & her head was then on the concrete.

I Crystal Alvarado have read the above statement and I certify and declare it to be true and correct under the penalty of perjury under the laws of the state of Washington.

dated on 5/21/09 Time 2:20 pm

Place given St. John's

Signature Crystal alvarado

Witness [Signature]

floor. Then later on it continued upstairs  
in Lisa's room a couple of times through-  
out the night. The chandelier was shaking  
on the ceiling and the lights flashing on &  
off downstairs because Jerry Anderson  
was body slamming her <sup>(Lisa)</sup> upstairs. We all  
could hear it below. Then Jerry Anderson  
actually earlier in the night cut the  
phone lines or did something to them  
one upstairs and down so that  
Lisa Shippy could not call the cops  
because Jerry Anderson did not want to  
go to Jail for this again because Lisa  
Shippy called the cops on him before  
I Crystal went upstairs to check my Laundry &  
I myself heard her being choked. She was gasping  
for air and could barely talk afterwards. I Crystal  
then went down and got her son Brandon Molnar &  
he went up to the room. Then my brother Brian  
& her came out because he heard it and made  
Jerry Anderson leave. He hung around until Lisa went  
to sleep & then snuck back in and was made leave when she  
woke up. The cops were not called because  
there were no phones.

## Exhibit 16

**STATEMENT**  
**Longview Police Department**  
**360-442-5800**

(PLEASE PRINT CLEARLY)

Full Name: Smith Eric Michael Birthdate: 03/04/84  
Last Name First Name Middle Name month / date / year

Home Address: 165 Morsepark Way #5 Home Phone: (360) 577-5936  
No. and Street City

Work Address: None Work Phone: None  
No. and Street City

The following statement is given to the Longview Police Department to aid an investigation. All facts given are true to the best of my knowledge.

I Eric walked to the door at the garage  
and seen Jerry Anderson on top of  
Lisa Garner holding Lisa down (Jerry's)  
where around Lisa's throat and (Lisa)  
she was  
calling for help. After Jerry got up he  
ran to the door and went to shut Lisa  
in the garage to keep her (Lisa) from coming out.  
Jerry Anderson then broke all the phones  
in the house as they continued to fight.  
(Eric) I went outside to get away from  
the dispute so that I wouldn't get involved  
I Eric sat in the back yard for the rest of  
time until I went upstairs and went to  
bed. I got up in the morning and  
Jerry was gone.

I Eric Smith have read the above statement and I certify and declare it to be true and correct under the penalty of perjury under the laws of the state of Washington.

dated on 5/26/09 Time 2:20 pm.

Place given St. Johns

Signature [Signature]

Witness [Signature] 360

### CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Lisa E. Tabbut  
Attorney at Law  
P.O. Box 1396  
Longview, WA 98632  
Lisa.tabbut@comcast.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 30<sup>th</sup>, 2012.

  
Michelle Sasser



# COWLITZ COUNTY PROSECUTOR

**April 30, 2012 - 1:43 PM**

## Transmittal Letter

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